The Religious Critique of Constitutional Jurisprudence

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These are troubled reflections by one trained in, but no longer a member of, any religious tradition.

What is the religious critique of constitutional jurisprudence? Does it consist of religious criticisms of the content of particular decisions by the US Supreme Court? Certainly many religious law professors have uttered and written such criticisms—that *Roe* allows the killing of the innocent or that *Citizens United* exposes the citizenry to the power of money.

Does it consist of religious criticism of the demands of the State on religious believers? Certainly, many religious law professors have praised the Religious Freedom Restoration Act and the *Hobby Lobby* case for protecting religious conscience from having to conform to laws that are in conflict with religious commands.

Does it consist of a more general resistance to the growing assumption in the legal academy that religion is irrational and even harmful? Certainly many religious law professors have criticized Brian Leiter's book, *Why Tolerate Religion?* They have complained about the refusal of law schools to hire religious law professors.

You might call of all these positions religious critiques of constitutional jurisprudence. Each of them is flawed and tends to make religion into just another interest group. But the more fundamental failing of them all is the failure to look at constitutional jurisprudence in its deepest dimension. That is, what does constitutional jurisprudence assume about the nature of reality and are those assumptions in keeping with what any religion would defend as the nature of reality?

There is an urgency today to look at all of law in its deepest dimension because of the emergency that has befallen American public life. After a Presidential campaign between two candidates widely regarded as untruthful, rife with false news and political manipulation, the American public distrusts all institutions. There is a feeling, and not just among Trump voters, that we are being lied to. Lied to pervasively.

Technology has played a role in this distrust and we must remember the somber warning of Martin Heidegger that it is unclear whether democracy is at all suited for a technological age.

What we should want to know is whether we lawyers and our work product—constitutional jurisprudence—have played a role in this emergency. We should suspect that we have played a role because *Marbury v. Madison* largely placed the care of constitutional democracy into the keeping of lawyers. How likely is it, then, that we have played no role?

We should want to know if we have led our fellow Americans astray. Confession and repentance are a fitting posture in a conference concerning law and religion.

When we do try to look at the depth dimension of constitutional jurisprudence, what do we see? All of the Justices proclaim that they are faithful to the Constitution and, within that restraint, that they promote democracy. Yet, we see also that these professed commitments are only partial and to some extent rhetorical. They are not clear and foundational.

We are looking for the foundation of constitutional jurisprudence—for a commitment that is not problematic but whole-hearted. Such a commitment can be seen in the view of all of the Justices about values. Values are seen in a relativistic fashion, in which it is not ontologically possible to speak of truth or even a hierarchy. Values are subjective, they are a matter of opinion or preference, and they do not pertain to knowledge. This understanding shapes everything about the field.

Most of the persons attending this conference are probably familiar with the dissent by Justice Antonin Scalia in the *Casey* abortion case in 1992, in which Justice Scalia criticized the majority's acceptance of the fundamental right of abortion on the ground that this represented a value judgment with which many Americans would disagree. And the value judgments of those Americans are just as good as those of the Justices on the Court. Justice Scalia pointed to the politicization of the Supreme Court nomination process as a consequence of the Court's entering into value judgments. He wrote that when courts do lawyers' work instead, *reading text and discerning our society's traditional understanding of that text--the public pretty much left us alone*.

This position, that value judgments can only reflect differing preferences, reflects a legal positivism that proclaims a fundamental distinction between law and morality. But, as is usual with such positivism, it cannot account for why any particular course should be chosen. So, the view that Justices should not make value judgments is itself a value judgment that is not directed by any legal source. The ninth amendment, just as one example, seems to direct the Justices to enforce otherwise non-enumerated rights. Since one value is as good as another, Justice Scalia cannot consistently object to the judicial actions he decries.

The subjective quality of values supported a position taken ten years later, in 2003, by the Court in *Lawrence v. Texas*, which struck down punishment of consensual gay sexual relations, that, quoting an earlier dissent by Justice Stevens, *the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice…* . Justice Scalia roundly criticized that holding, and rightly so, for its radical departure from the tradition of a rule of law, which of course has always been understood as having something to do with morality. But, as a legal positivist, Justice Scalia should have conceded that a moral claim could not serve as a rational basis for a law, since morality is a matter of opinion.

At the same time in 1992 that the conservative bloc was proclaiming the relativism of values in *Casey*, the liberal bloc was pronouncing at least secular morality to be nothing more than a matter of human choice, in *Lee v Weisman*. I called this juxtaposition of opinions in a recent law review article *The Five Days in June When Values Died in American Law* because all of the Justices joined either the Scalia dissent in *Casey* or the Justice Anthony Kennedy majority opinion in *Lee*.

The issue in *Lee* had to do with the constitutionality of prayers at a high school graduation, actually a middle school graduation, and the defense that since the prayers involved were nondenominational, they did not violate the Establishment Clause. Justice Kennedy rejected this defense and found the prayers unconstitutional:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

This passage had nothing to do with the particular prayers offered by Rabbi Gutterman at the graduation. Those prayers raised no claims of morality or ethics. Rather, the passage characterizes as religious in nature any claim that morality transcends human choice, thus raising Establishment Clause objections.

Lee demonstrates the death of values in American law. If religion involves claims about the independence of morality from the opinions of human beings—an activity the opinion says government may not "undertake"—then secular instruments like law must not involve claims of value objectivity and moral realism. A law like ours, which must be based on secular sources, cannot make the claim that values "transcend[] human invention." This is the same view of values as that espoused by Justice Scalia in his *Casey* dissent.

I am not here criticizing of defending the results in *Casey*, *Lee* or *Lawrence*. I am asking, what is the foundation of constitutional jurisprudence? I find that foundation to be the subjective nature of values resulting from human choice. I fully agree with Justice Kennedy that the opposite view—the commitment that ethics and morality transcend human invention—is religious in nature, is the commitment of all religious traditions, indeed of all traditions of moral realism. Thus, the religious critique of constitutional jurisprudence should consist in the rejection of its relativist foundation. Religious law professors, and their fellow travelers in moral realism, should insist that the meaning of the universe is not just a reflection of human choices. We should be insisting in our writing and to our students that the universe—reality—is founded on an intelligence and order that human law must reflect if law is going to promote human flourishing.

But I want to go further than this. The emergency that has overtaken American public life also roots in this foundation of constitutional jurisprudence—in the unconscious assumption that, with the death of God, there is no underlying order to anything. In a universe of chaos and chance, there is no ground for trust. In such a universe, all institutions will be under suspicion, as indeed they are today. In such a universe, there will be not any shared measures of

verification, even for what we might call factual claims. Such a universe cannot sustain democratic constitutionalism.

But I want to go even further than that. The very fact that these positions could be voiced by Justices on the Supreme Court, without serious objection from the legal academy, including religious law professors, when even brief reflection demonstrates their radical and unacceptable nature, shows that law professors have become so much a part of the ideological divisions on the Supreme Court that we have lost our capacity for genuine critique. Yes, of course, we law professors are able to argue that one side or the other is right in this or that case. But we are so concerned about breaking ranks with our political side, that we cannot see the whole of law and its nature. At least teachers in religiously affiliated law schools should not be partisan in this way.[1]

We are in a very bad situation and I am not here to propose some simple solution. But I will close with the following observation. At the January AALS annual meeting, there was a plenary session about the incoming Trump administration. It was all gloom and doom. Well-known liberal dean Erwin Chemerinsky solemnly proclaimed that Donald Trump does not believe in the rule of law and does not believe in truth. I almost grabbed the microphone to respond that Donald Trump should then be teaching in a law school, because we have been teaching value skepticism since the 1950's. As a discipline, law has to stop doing that and this Conference is the proper place to promote that recognition.

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[1] See Bruce Ledewitz, The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy, __ UMass L.Rev. __ (upcoming 2017).